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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 848

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

BEULAH EATON MCALLISTER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

The Acting Solicitor General, on behalf of the Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Second Circuit entered in this case.

OPINIONS BELOW

The prevailing (R. 37–40) and dissenting (R. 40–43) opinions in the Tax Court are reported at 5 T. C. 714. The majority and dissenting opinions in the court below (R. 73–82) are reported at 157 F. 2d 235.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on August 6, 1946. (R. 82.) Upon application made on behalf of the Commissioner, an order was entered by Mr. Justice Jackson on

October 26, 1946, extending for a period of sixty days from November 6, 1946, the time within which a petition for a writ of certiorari may be filed herein on behalf of the Commissioner. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The taxpayer had a life interest in a testamentary trust, the annual payments from which were taxable to her as ordinary income. In 1940 she relinquished her interest and received a lump sum payment. In her returns she treated that payment as the proceeds of the sale of a capital asset and claimed a deductible loss. Did the Commissioner correctly treat the lump sum payment as a substitute for the future income payments and therefore taxable as ordinary income upon its receipt?

STATUTE INVOLVED

The pertinent provisions of the statute are set forth in the Appendix, *infra*, pp. 14–16.

STATEMENT

The facts found[1] by the Tax Court (R. 25–37) may be summarized as follows:

Richard McAllister (hereinafter referred to as the testator) died in 1926, leaving a will and

[1] The facts were developed primarily by a stipulation between the parties (R. 20–23) and certain exhibits therein referred to, which the Tax Court adopted as its findings (R. 25). The exhibits were transmitted to the court below in

codicil in which he provided for the setting up of a trust fund of $100,000, the income of which was to be paid to his son John for life, and upon John's death without children to John's wife (the taxpayer herein); on her death the trust was to terminate and the residue to go to the testator's wife, Josephine, and to his son Richard. The will and codicil contained "spendthrift" provisions, prohibiting alienation or anticipation of the trust income by any beneficiary. (R. 25–26.)

The testator's widow died in 1935. John died (apparently without children) in 1937, and the taxpayer, by a decree of the Chancery Court of New Jersey, in an action brought by her against the trustees of the trust, was adjudged his lawful widow and entitled to receive for life the income of the $100,000 trust fund. (R. 26–27.)

In 1940 the taxpayer, in order to obtain immediate funds to pay claims against her husband's estate and to terminate extended family litigation, brought a proceeding in the Chancery Court of New Jersey, seeking, amongst other things, a termination of the trust. In her complaint (R. 28–30) she alleged, amongst other things, that she had "indicated to the aforesaid trustees, the remaindermen * * * her desire to terminate the trust", and that she was advised "that said trustees and remaindermen

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their original form and omitted from the printed record, on order of the court below (R. 68–69), but the material portions thereof are contained in the findings of the Tax Court.

* * * are willing to consent to the termination of said trust and will pay to complainant the sum of $55,000 * * * in full consideration of the surrender by her of her life interest in said trust, which settlement figure is based to a large extent upon her present life expectancy" (R. 28–29). In a stipulation of facts (R. 30–31) filed in that proceeding it was stated, in part, that "all the parties in interest" (R. 30), desirous of ending litigation and terminating the trust, have agreed that "the trust * * * be completely terminated and ended by the payment to the widow of John McAllister * * * and by the acceptance by her of the sum of Fifty-five Thousand Dollars * * * to be paid by Richard McAllister * * * in full settlement of the termination of said trust" after the approval of the court and upon the execution by her of releases to the trustees consenting to the termination and cancellation of the trust (R. 30–31).

A final decree was entered in that proceeding on July 19, 1940 (R. 31), approving the settlement referred to in the pleadings and stipulation and directing, the payment of $55,000 to the taxpayer "in full settlement of the termination of the trust" (R. 32), upon the execution by her of a release to the trustees as above stated. The decree was consented to by all the parties, including the taxpayer. Thereafter, the consummation of the settlement under the decree was reported (R. 33–34) to the court on September 3, 1940, and was confirmed

(R. 34–35) by final order of the court by which the trust was "terminated and extinguished" (R. 35) and the trustees were discharged. Under date of July 19, 1940, the taxpayer executed her release (R. 35–36) to the trustees, in which she stated that the payment of $55,000 to her was to "represent the value of her life interest in the aforesaid trust" (R. 35), and in consideration thereof she released and discharged the trustees and consented that her estate in the trust be (R. 36) "terminated absolutely." On July 19, 1940, the taxpayer received the sum of $55,000 from Richard McAllister, Jr. (R. 36.)

For the years 1937 to 1940, inclusive, the taxpayer had reported as taxable income the amounts of income received by her under the trust. In her 1940 return, however, she reported a loss of $8,790.20, which she explained as the difference between the $55,000 received upon the sale of her life interest under the trust and $63,790.20, the value thereof on the date of sale as computed by the taxpayer. (R. 36–37.)

The Commissioner, in his deficiency notice (R. 10–13, 37), disallowed the claimed deduction and held that the sum of $55,000 received by the taxpayer upon the termination of the trust was taxable as ordinary income.

The Tax Court (four judges dissenting (R. 40–43)) held that the $55,000 constituted ordinary income (R. 37–40), and accordingly sustained (R. 43) the deficiency determined by the Commis-

sioner.[2] The court below reversed, one judge dissenting (R. 73–82).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

(1) In failing to hold that the amount received by the taxpayer in settlement of her life interest in the income of the trust constituted ordinary income taxable in full under Section 22 (a) of the Internal Revenue Code.

(2) In holding that the amount in question may be treated as the proceeds of the sale of a capital asset under Section 117 of the Code.

(3) In reversing the decision of the Tax Court.

REASONS FOR GRANTING THE WRIT

1. The fundamental issue in this case is whether a taxpayer can convert a series of taxable income payments into a mere return of capital. It is a matter of substantial public importance that the issue be reviewed by this Court; for the result of the decision below opens up numerous tax avoidance possibilities whereby a taxpayer, by private agreement, could anticipate future income payments and simultaneously transform taxable income into a deductible loss—a result which the Tax Court described as "inconceivable" (R. 40).

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[2] The deficiency as redetermined by the Tax Court (R. 43) was in the amount of $15,508.59, instead of $19,468.59, originally determined by the Commissioner (R. 10–13), as the result of adjustments with respect to other items, not involved here.

The $55,000 received by the taxpayer herein was in essence no more than a substitute for the future payments, which would have been taxable as ordinary income. *Irwin* v. *Gavit,* 268 U. S. 161. And the mere fact that these payments have been telescoped into a single payment does not deprive that payment of its character as taxable income. *Hort* v. *Commissioner,* 313 U. S. 28. Even though the right of the taxpayer to receive the periodic payments of income under the trust constitutes an "asset" or a "property right", and even though the taxpayer in the settlement gave up that "property right", the transaction did not in any real sense amount to a sale or exchange of a capital asset. It was no more than the receipt of ordinary income, paid in a lump sum, in advance, and taxable as such, just as advance payments of dividends, interest, and salaries are taxable as ordinary income.

It is submitted that the court below erred in rejecting the Commissioner's and the Tax Court's treatment of the amount received by the taxpayer as ordinary income taxable in full. The Tax Court has consistently held that the amount received by a beneficiary upon the disposition of a life interest in trust income *having no cost basis,* results not in capital gain or loss, but in ordinary income taxable in full, in *Estate of Bell* v. *Commissioner,* 46 B. T. A. 484; *Quigley* v. *Commissioner,* 1 T. C. 831, and in the instant

case (R. 37–40). The Circuit Court of Appeals for the Eighth Circuit, with one judge dissenting reversed the *Bell* case, (*Bell's Estate* v. *Commissioner,* 137 F. 2d 454), while the Circuit Court of Appeals for the Seventh Circuit reversed the *Quigley* case (*Quigley* v. *Commissioner,* 143 F. 2d 27). Recently, after the court below had reversed the Tax Court in the instant case, the Circuit Court of Appeals for the Fifth Circuit in *Allen* v. *First Nat. Bank & Trust Co. in Macon,* 157 F. 2d 592, sustained a District Court decision (M. D. Ga., 65 F. Supp. 128), which was likewise against the Government on this issue. The Government has not hitherto asked the Court to review the issue, hoping that a conflict would develop among the circuits on this precise question. However, in view of the importance of the matter, it is felt that further delay in applying for certiorari would not be justified and that the question has been sufficiently litigated in the lower courts to warrant review by the Court at this time.

2. The decision below is in conflict in principle with *Hort* v. *Commissioner,* 313 U. S. 28, and *Irwin* v. *Gavit,* 268 U. S. 161. In the *Hort* case it was held that the amount received by the taxpayer-lessor as consideration for the cancellation of a lease was essentially a substitute for future rental payments and taxable as such. The taxpayer had contended that the amount

received represented merely a return of capital with respect to the unexpired portion of the lease, which had some nine years yet to run. Pointing to the broad definition of gross income contained in Section 22 (a), this Court stated (pp. 30, 31):

> Plainly this definition reached the rent paid prior to cancellation just as it would have embraced subsequent payments if the lease had never been canceled. It would have included a prepayment of the discounted value of unmatured rental payments whether received at the inception of the lease or at any time thereafter. * * *
>
> The consideration received for cancellation of the lease was not a return of capital. We assume that the lease was "property," whatever that signifies abstractly. Presumably the bond in *Helvering* v. *Horst*, 311 U. S. 112, and the lease in *Helvering* v. *Bruun*, 309 U. S. 461, were also "property," but the interest coupon in *Horst* and the building in *Bruun* nevertheless were held to constitute items of gross income. Simply because the lease was "property" the amount received for its cancellation was not a return of capital, quite apart from the fact that "property" and "capital" are not necessarily synonymous in the Revenue Act of 1932 or in common usage. Where, as in this case, the disputed amount was essentially a substitute for rental payments which § 22 (a) expressly character-

> izes as gross income, it must be regarded as ordinary income, and it is immaterial that for some purposes the contract creating the right to such payments may be treated as "property" or "capital."

The prevailing opinions in the court below and in the other circuit courts of appeals (in the *Bell, Quigley* and *First Nat. Bank* cases), holding that the amount received by the life beneficiary upon the disposition of his right to the trust income shall be treated as the proceeds of the sale of a capital asset under Section 117 (a) (Appendix, *infra*), are clearly in conflict with the principles enunciated by this Court in the *Hort* case. The amount in question should be held taxable as ordinary income, since it is essentially a substitute for the trust income which would be taxable as ordinary income. *Irwin* v. *Gavit, supra.* The amount received by the taxpayer was ordinary income, taxable as such, the same as prepaid rentals, interest, or salaries, which have been long recognized to be taxable as ordinary income.[3]

3. Insofar as the majority of the court below purported to follow *Blair* v. *Commissioner,* 300 U. S. 5, it has misapplied that decision. The

[3] For analogous situations in which receipts have been held taxable as ordinary income, see *Salvage* v. *Commissioner*, 76 F. 2d 112 (C. C. A. 2), affirmed, 297 U. S. 106; *Cox* v. *Helvering*, 71 F. 2d 987 (App. D. C.); *Burnet* v. *Harmel*, 287 U. S. 103; *Helvering* v. *Smith*, 90 F. 2d 590 (C. C. A. 2); *Levinson* v. *Commissioner*, 154 F. 2d 60 (C. C. A. 2); *Rhodes' Estate* v. *Commissioner*, 131 F. 2d 50 (C. C. A. 6).

Blair case, together with such decisions as *Harrison* v. *Schaffner*, 312 U. S. 579, raised the question how far the beneficiary of a trust may remain taxable with respect to trust income actually paid to someone other than the beneficiary as a result of an irrevocable assignment. No question was either raised or decided in those cases as to the taxability of income actually received by the beneficiary. Those cases were concerned with the question as to *who*, as between the beneficiary-assignor and a gratuitous assignee, was liable for tax on the trust income paid to the assignee. Here, the question is *whether* an amount *actually received* by the beneficiary in substitution for ordinary income payments is to be treated as ordinary income. The court below has apparently been led into error by the superficial similarity between this case and the *Blair* case, since both of them involve the disposition of a life interest in a trust by a beneficiary. Had the assignor in the *Blair* case received payment from the assignee, the Court could with as much reason, and without conflict with its decision therein, have ruled that the consideration received was a commutation of the future payments and taxable as ordinary income, just as it later ruled in the *Hort* case that the consideration received was a commutation of future rentals and taxable accordingly. Even though the life interest of the taxpayer may have been "property" within the scope of the *Blair* case, that decision does not require that the amount received by the taxpayer in

lieu of annual income payments be converted into a return of capital.

By treating the amount thus received as a return of capital, the court below has sought to bring this case within Section 117 which deals with the tax consequences of the sale of a capital asset. But, as noted in Judge Frank's dissenting opinion (R. 81), it seems "most unlikely" that Congress intended the situation involved in the present case to come within the relief provisions of Section 117. The capital gains provisions embodied in Section 117 were designed, as an exception to the general rule of taxing income, to relieve taxpayers of the excessive burdens otherwise resulting from a conversion of capital assets. *Helvering* v. *N. Y. Trust Co.*, 292 U. S. 455, 466; *Burnet* v. *Harmel*, 287 U. S. 103. Like other provisions authorizing deductions, credits and the like, they are to be strictly construed. *Helvering* v. *Northwest Steel Mills*, 311 U. S. 46, 49. When analyzed in the light of their obviously different legislative history and the different policy which Sections 117 and 22 (a) embody, it is obvious that the term "property" used in Section 22 (a) for the purpose of determining who, as the owner thereof, is to be taxed on the income therefrom, is broader and more embracing than the term "property" used in Section 117 (a). It seems clear that the term as used in Section 117 (a) was intended to exclude such items as interest, dividends, or salaries (*Helvering* v. *Smith*, 90 F. 2d 590 (C. C.

A. 2); cf. *Maass* v. *Higgins*, 312 U. S. 443, 449), and, we submit, that it was likewise intended to exclude trust income, such as involved in the instant case.

By misapplying the *Blair* case, the decision of the court below raises doubts as to the application of the basic income tax concept that the right to income, such as earnings, rents, dividends, interest, and the like, may not be capitalized without first paying an income tax thereon—or, in other words, that the right to income must "pass through the door" of taxable income in order to become a capital asset which is subsequently tax-free to the extent of its basis. The fundamental character of the issue thus presented calls for a decision by this Court, and the importance of the case in the administration of the tax laws is further underscored by the need for clarification by this Court of the meaning of the term "property" as used in Sections 22 (a), 117 (a) and 113 (a) (5) (Appendix, *infra*).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

GEORGE T. WASHINGTON,
Acting Solicitor General.

JANUARY 1947.

APPENDIX

Internal Revenue Code:

SEC. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service * * *, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

(b) *Exclusions from Gross Income.*—The following items shall not be included in gross income and shall be exempt from taxation under this chapter:

* * * * *

(3) *Gifts, Bequests, and Devises.*—The value of property acquired by gift, bequest, devise, or inheritance (but the income from such property shall be included in gross income);

* * * * *

(26 U. S. C. 22.)

SEC. 111. DETERMINATION OF AMOUNT OF, AND RECOGNITION OF, GAIN OR LOSS.

(a) *Computation of Gain or Loss.*—The gain from the sale or other disposition of property shall be the excess of the amount

realized therefrom over the adjusted basis provided in section 113 (b) for determining gain, and the loss shall be the excess of the adjusted basis provided in such section for determining loss over the amount realized.

* * * * *

(c) *Recognition of Gain or Loss.*—In the case of a sale or exchange, the extent to which the gain or loss determined under this section shall be recognized for the purposes of this chapter, shall be determined under the provisions of section 112.

* * * * *

(26 U. S. C. 111.)

SEC. 112. RECOGNITION OF GAIN OR LOSS.

(a) *General Rule.*—Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 111, shall be recognized, except as hereinafter provided in this section.

* * * * *

(26 U. S. C. 112.)

SEC. 113. ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS.

(a) *Basis (Unadjusted) of Property.*—The basis of property shall be the cost of such property; except that

* * * * *

(5) *Property Transmitted at Death.*—If the property was acquired by bequest, devise, or inheritance, or by the decedent's estate from the decedent, the basis shall be the fair market value of such property at the time of such acquisition.

* * * * *

(b) *Adjusted Basis.*—The adjusted basis for determining the gain or loss from the

sale or other disposition of property, whenever acquired, shall be the basis determined under subsection (a), adjusted as hereinafter provided.

* * * * * *

(26 U. S. C. 113.)

SEC. 117. CAPITAL GAINS AND LOSSES.

(a) *Definitions.*—As used in this chapter—

(1) *Capital Assets.*—The term "capital assets" means property held by the taxpayer (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business, or property, used in the trade or business, of a character which is subject to the allowance for depreciation provided in section 23 (l); * * *

(26 U. S. C. 117.)

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